In the Supreme Court of the United States.

OCTOBER TERM, 1904.

WESLEY E. TRAVIS, APPELLANT,
v.
THE UNITED STATES. } No. 84.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

On September 15, 1896, the Postmaster-General of the United States advertised for proposals for transporting the mails in various cities of the United States, and, among others, on route No. 404011, being the covered screen wagon mail-station service at Boston, Mass., for the term from July 1, 1897, to June 30, 1901. (Rec., p. 3.) Accompanying this advertisement for proposals were detailed instructions to bidders as to the manner and character of the proposed service and contract, which instructions contained the following:

> There will be no diminution of compensation for partial discontinuance of service or increase of compensation for new, additional, or changed

> service that may be ordered during the contract term; but the Postmaster-General may discontinue the entire service on any route whenever the public interests in his judgment shall require such discontinuance, he allowing, as full indemnity to the contractor, one month's extra pay. (Rec., pp. 4, 14.)

In pursuance of this advertisement and the stipulation above stated and therein contained, the claimant made and filed with the Post-Office Department a proposal for the performance of said service for the period named for the sum of $3,780 per annum. This proposal stated that the claimant proposed to carry the mails—

> under the advertisement of the Postmaster-General, dated September 15, 1896, and subject to all the requirements and conditions contained therein, etc.

and further that—

> This proposal is made after due inquiry into and with full knowledge of all the particulars in reference to the service; and also after careful examination of the conditions attached to said advertisement and with intent to be governed thereby. (Rec., pp. 3, 4.)

The claimant's proposal was duly accepted by the Department, the contract duly awarded to him, and thereupon a contract, in writing, was entered into December 21, 1896, between the defendants and claimant for the performance of the service during the period named above. (Rec., pp. 4, 5, 6, 7, 8.) This contract

referred to the advertisement above named and by express statement made it a part of itself (Rec., p. 5), and further contained the following stipulation as to the power and right of the Postmaster-General to discontinue the service:

> It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster-General may change the schedule and termini of the route, vary the routes, increase, decrease, or extend the service thereon, without change of pay; and that the Postmaster-General may discontinue the entire service whenever the public interest, in his judgment, shall require such discontinuance; but for a total discontinuance of service the contractor shall be allowed one month's extra pay as full indemnity. (Rec., p. 7.)

The contract further stipulated that—

> This contract is further to be subject to all the conditions imposed by law and the several acts of Congress relating to post-offices and post-roads. (Rec., p. 8.)

The claimant thereupon made the necessary preliminary arrangements preparatory to the performance of the service under his contract and therein expended $500, and was able and willing to perform but was prevented by defendants in the manner and for the reason below stated. (Rec., p. 8.)

Before the date upon which the claimant was to commence the performance of said service under the terms of the contract the Postmaster-General determined to

dispatch certain mails upon the electric street cars, instead of by the wagon service contracted for, thereby expediting the dispatch of the mails. The service under the contract covered 28,886 miles of travel per annum, but, by reason of this change made by the Postmaster-General, the annual miles of travel which would have been left to be performed under the contract was but 23,088 miles—a decrease in the quantity and volume of service required to be performed of 5,798 miles per annum, or 20 per cent, from the annual mileage embraced and called for by the advertisement. (Rec., pp. 8, 14.)

By reason of this change, by which the Postmaster-General was enabled to expedite the dispatch of mails by other means, above referred to, than those provided in the contract with claimant, the Postmaster-General, by order of April 27, 1897, discontinued the service of claimant, as follows:

> Discontinue service, to take effect July 1, 1897, and allow contractor one month's extra pay. (Rec., p. 8.)

The United States thereupon entered into another contract with another person, at the rate of $2,475 per annum, for the same contract period for the service not changed to street-car service. (Rec., p. 8.) This new contract was made after public advertisement, as required by law, of which the claimant in this case had full notice and on which he could have bid had he desired to do so, but he did not. (Rec., p. 14.)

The difference between the amount it would have

cost claimant to have performed the service and the amount he would have received therefor is $5,500.

Claimant brought suit in the Court of Claims to recover damages for the action of the Postmaster-General in discontinuing the service under his contract, and the court dismissed the petition upon the ground that the contract gave the Postmaster-General the right to discontinue the service whenever the public interest in his judgment should require such discontinuance, the claimant in such case to be allowed one month's extra pay as full indemnity; and that the Postmaster-General rightly discontinued the service under claimant's contract to subserve the public interest in taking care that no unreasonable compensation was paid for the service actually performed.

From this judgment the present appeal was taken by the claimant.

ARGUMENT.

Termination of the contracts for which action claim for damages is made.

The question involved arises upon the claim for damages for an alleged breach of contract on the part of the United States through the Postmaster-General, in discontinuing the service under the claimant's contract.

The facts as to the action of the Postmaster-General in this regard are fully set forth in the statement. In the proper exercise of discretion reposed in him, the Postmaster-General has established improved mail service by dispatch of certain mails upon the electric

street cars, instead of by wagon service as contracted for with the claimant. This action decreased the quantity and volume of service which was required to be performed under claimant's contract 20 per cent of the annual mileage, thus relieving him of the performance of a large amount of service stipulated for in the advertisement.

Wagon service in cities such as that for which complainant contracted is always subject to constant change as to the amount of service, the weights of mails, and increase or decrease in mileage which will be required thereunder; consequently it has long been customary to provide that these changes in requirements shall be without change of pay, and the claimant's contract provided, therefore, that there should be no diminution of compensation for partial discontinuance of service. Consequently, if this contract were to be continued the United States would continue to pay him for the large amount of service which he was not performing and for which defendants were paying others.

But while it is true that this contract provided in this manner for the mutations in the service, which provision would undoubtedly govern so long as the contract was allowed to remain in force, yet there was another provision in the same clause which gave the Postmaster-General the right to discontinue the whole service whenever the public interest, in his judgment, should require it. Therefore, it appears clear that though so long as this contract remained in force there could be no change in pay for increases or decreases

of service, it was also intended to repose in the Postmaster-General the power to terminate the existence of the contract when, in his judgment, such decrease should become so great as to make a discontinuance necessary in the public interest.

Believing that the public interest demanded such discontinuance, the Postmaster-General did so discontinue the service under the claimant's contract, allowing him the one month's extra pay in accordance with these provisions.

It is contended on the part of the claimant that this was a breach of the contract, for the alleged reason that the United States were obliged, under the terms of the contract, to continue it without diminution of pay, notwithstanding the decrease in the service, and that the Postmaster-General had no power to discontinue the remaining service under the claimant's contract, but only to discontinue the whole mail service.

On behalf of the United States it is insisted that the acts of the Postmaster-General were in all respects in accordance with the power reserved to him in the contract itself.

The right of the Postmaster-General to discontinue the service.

1. The right to discontinue the service is provided for by the Postal Laws and Regulations, section 817, edition 1887 (in force at the time of the execution of the contracts), which section provides that—

> The Postmaster-General may discontinue or curtail the service on any route, in whole or in

> part, in order to place on the route superior service, or whenever the public interests in his judgment shall require such discontinuance or curtailment for any other cause, he allowing as full indemnity to the contractor one month's extra pay on the amount or service dispensed with, and a pro rata compensation for the amount of service retained and continued.

This regulation, made in accordance with Revised Statutes, section 161, conferring upon the Postmaster-General the right to make regulations not inconsistent with law, is thus given the full force and effect of a statutory enactment. (*Gratiot* v. *The United States*, 4 How., 80, 117; *ex parte Reed*, 100 U. S., 13; *Smith* v. *Whiting*, 116 U. S., 181.)

The contract being one made for the transportation of the mails was, by necessary implication, subject to this regulation in so far as the contract provisions themselves did not supersede it. To a like extent it was made subject to the regulation by a specific provision, as follows:

> And this contract is further to be subject to all the conditions imposed by law and the several acts of Congress relating to post-offices and post-roads. (Rec., p. 8.)

By reference to the provision of the contract it will be observed that the effect of the regulation was modified with reference to the allowance of only pro rata pay in case of curtailment or partial discontinuance, but the right to discontinue was left unaffected, in fact was affirmed.

Counsel for claimant puts much stress upon his contention that this regulation could not be applicable in any respect to the contract under consideration for the reason, as he alleges, that it was designed to apply to another class of transportation service, and further that its provisions are inconsistent with the provisions of the contract to the effect that no allowance will be made for increase or decrease in service, and, therefore, that the provision of the regulation relating to the right to discontinue the whole service can have no application to a wagon contract.

There is no merit whatever in this contention. The regulation is a general regulation which is found under the general subject of the transportation of the mails. It has its broadest and, in fact, its complete application to star and steamboat service where these provisions with reference to the curtailment of the service and the allowance of a pro rata compensation for the amount of service retained and continued, as well as the provision relating to the discontinuance of the service, are effective. Both features of this regulation, that is, the one with reference to the discontinuance of the service, and the other with reference to the curtailment of the service, apply to all classes of service under formal contract for the transportation of mails, unless there be statutory provisions, as in the case of transportation by railroads where Congress has fixed the rate of pay, or in the case of wagon service in the cities such as the one under consideration where

the special conditions of that service require contract provisions in substitution for that relating to curtailment.

The wagon service in cities is a service which, in point of historical sequence, originated subsequent to the star service, which is for the transportation of mails across the country without regard to the mode thereof. With reference to the needs of service between points in a city, different conditions exist than are found in the service between post-offices removed from each other in the country. The growth of the city is rapid. New postal stations are constantly being established, new railroad depots may be built or existing ones changed in location, new points of exchange of mails become necessary, and points which exist at the beginning of a contract may be discontinued or changed in location. These conditions necessitate a contract provision which would allow the continuance of the rate of pay during the existence of the contract without the continual changes which would be necessary if the provision of the regulations relating to pro rata increase or decrease in pay should obtain.

Therefore, the contracts for this class of service make an exception in this particular to the provision of this regulation; but it should be noted that the exception made is only in this one particular, and leaves unimpaired the general provision with reference to the right to discontinue the service. The result, therefore, is that this regulation is fully applicable to this class of contracts as well as to other classes of transportation contracts, excepting in so far as the

contract itself supersedes it, and, therefore, the power reserved therein to the Postmaster-General to discontinue the service is fully applicable.

2. Although it is insisted that the provision of this regulation fully authorized the Postmaster-General to discontinue the service under complainant's contract it is not relied upon wholly, because it is quite unnecessary to seek any other authority for that right than that which is found in the express terms of the contract itself.

The advertisement provides as follows:

> There will be no diminution of compensation for partial discontinuance of service, or increase of compensation for new, additional, or changed service that may be ordered during the contract term; but the Postmaster-General may discontinue the entire service on any route whenever the public interests, in his judgment, shall require such discontinuance, he allowing as full indemnity to the contractor one month's extra pay. (Rec., pp. 4, 14.)

The contract not only makes this a part of itself, but by further express stipulation provides as follows:

> It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster-General may change the schedule and termini of the route, vary the route, increase, decrease, or extend the service thereon, without change of pay; and that the Postmaster-General may discontinue the entire service whenever the public interest, in his judgment, shall require such discontinuance; but for a total dis-

continuance of service the contractor shall be allowed one month's extra pay as full indemnity. (Rec., p. 7.)

In these provisions we find the most ample authority in unequivocal language. There are two subject-matters in these provisions, each of which is entirely distinct from and independent of the other. The first is that for an increase or decrease in service there will be no change in pay. The second is that the Postmaster-General may discontinue the entire service when in his judgment the public interests demand it. These have no relation with each other, not being necessarily connected in meaning and being set off from each other by semicolons and the use of conjunctions, which clearly show their independence.

3. The right to discontinue mail service under a regulation similar to the one above quoted has been determined by this court.

The practice to so discontinue has been officially advised by the Attorney-General under practically identical conditions, and must be presumed to have become an executive construction by the Postmaster-General.

(a) This court passed upon the question in the case of *Garfielde* v. *The United States*, 93 U. S., 242, affirming the right of the Postmaster-General to so act. Counsel for claimant urges that this case is not relevant, because the advertisement for that service contained section 263 of the Postal Laws and Regulations (which is the same as 817 herein relied upon), and

Garfielde's proposal stated that he had full knowledge of the laws and regulations of the Department on the subject. It is therefore claimed by counsel for claimant that this regulation was part of the express contract, and that the case, therefore, differs essentially from the one at bar.

There does not appear to be any merit in this contention, because it is immaterial how the claimant becomes bound by the provisions of the regulation, whether they be recited specifically in the advertisement or whether, as in the case at bar, the contract is by necessary implication made subject to the provisions of the same regulation found in the Postal Laws and Regulations. In either case the only material question is whether under such provision the Postmaster-General was justified in terminating the service under the contract. In the Garfielde case this court has said that he was so justified.

It is urged here further on behalf of the United States that even if this court were not of opinion that section 817 of the Postal Laws and Regulations is applicable to the contract in question, this case of Garfielde is determinative because the question at issue there is practically the same question which is presented in this case under the *provision of the contract itself* with reference to the right of the Postmaster-General to discontinue the service.

This question of the Postmaster-General's right to discontinue the service under the contract containing substantially like condition, has been referred to with ap-

proval by this court in the case of *Chicago and Northwestern Railway Company* v. *The United States*, 104 U. S., 680.

In that case the railway company had entered into a contract with the Postmaster-General for the transportation of the mails at the rate fixed by the statute, which contract contained a provision authorizing the Postmaster-General to discontinue or curtail the service in whole or in part, he allowing as an indemnity to the contractor one month's extra pay on the amount of service dispensed with and a pro rata compensation for that retained and continued. Apparently this provision of the contract was the same as section 817 of the Postal Laws and Regulations, 1887, hereinbefore referred to.

While the power granted the Postmaster-General to discontinue, under this provision, was not exercised in that case, this court clearly recognized that power in the statement as follows:

> It is true that under this reservation the Postmaster-General would be authorized to discontinue the entire service contemplated by the contract, and the practical effect of that would be to terminate the contract itself on making the indemnity specified (p. 684).

(b) In the 19 *Opinions of the Attorney-General*, 147, 148, substantially the same question as herein involved was under consideration, namely, the right to discontinue service (or contract) under the reservation made in section 817, Postal Laws and Regulations, the same

as in the case at bar, before the end of the term of the contract. The cases are similar in all substantial features, the only difference being that in this case provision is made for the increase or decrease of service without increase or decrease of pay, whereas in the case cited such increase or decrease might be made only with a pro rata change of pay. That portion of the provision with reference to the right to discontinue the entire service or the contract is the same.

The advantage to the contractor of a continuance under either provision was exactly the same, the fact of advantage not being in any wise affected by this variation of terms under which such arose, for it must be evident that it is in effect just the same to the contractor whether he is deprived of the privilege, under the terms of the contract, to perform extra service at pro rata increased pay, or whether he is deprived of continuing his performance under the terms of his contract without diminution of pay for decreased service. In that case the Attorney-General said:

> The changing interests of the public and the good of the service may require that the number of mails in a given time should be increased after the contract shall have been made. If but a single mail a week is called for in the advertisement for the letting of a contract, bidders would be likely to ask for a higher price for the carrying of that single mail than they would for each of a larger number of mails on the same route within the same time. To provide

for such a change, when just and expedient, section 817 of the Postal Laws and Regulations provides:

(Here follows the language of said section, as hereinbefore set out.)

> This regulation is, in substance, incorporated in the instructions given by the Department to bidders for contracts, and constitutes a part of the contract when made. The regulations and instructions give full notice to bidders and contractors that the Postmaster-General reserves to himself the power to discontinue a given service whenever the public interests, in his judgment, shall require it.

That is to say: If, after the contract is entered into, it becomes apparent to the Postmaster-General that by reason of changed conditions requiring augmented service, which may be secured by the discontinuance and the reletting of the service for a less sum than would have to be paid to the contractor, even though his contract expressly provides for such augmentation of the service with the increased and larger sum paid to himself, nevertheless it is in the discretion of the Postmaster-General to discontinue and readvertise the same, and that exercise of discretion can not be questioned, nor can the contractor complain, because he has had ample notice and consented in advance to the reservation of such right.

If there is any difference between the case considered by the Attorney-General and this one with respect to the source of authority for the act of dis-

continuance, it is that in the one case it was the regulation (similar to the one cited, *supra*) and in the other it is practically the same provision, but found in the contract itself. If it should be held that this difference does exist, still it is immaterial, as the provision is substantially the same in both instances.

The grounds on which the discretion was exercised and the facts which constituted them.

The grounds upon which such discretion could be exercised are as follows:

1. Section 817, Postal Laws and Regulations, 1887, supra, provides that such discontinuance may be made, (*a*) "In order to supply on the route superior service;" (*b*) "Or whenever the public interests, in his judgment, shall require such discontinuance or curtailment for any other cause."

2. The instructions to bidders, set forth in the advertisement and made a part of the contract, provide that the Postmaster-General may discontinue the service "whenever the public interests, in his judgment, shall require such discontinuance." The contract specifically provides, further, that he may discontinue the service "whenever the public interests, in his judgment, require such discontinuance."

The claimant's services required under the original schedule of the advertisement had been greatly decreased by reason of the inauguration of a new and improved service and a diversion thereto of mails

which were to have been carried by the claimant under his contract.

As to the legality and wisdom of the acts of the Postmaster-General thereupon no better estimate can be submitted than that expressed by Mr. Justice Wright in delivering the opinion of the Court of Claims in the case of *Luther Clay Slavens* v. *The United States* (38 C. Cls., p. 574). The reasoning set forth there is entirely applicable to this case, inasmuch as the case at bar was considered by the Court of Claims in connection with the Slavens case and made to depend upon the reasons set forth therein. The following is from the opinion of the court and delivered by Mr. Justice Wright:

> It is also insisted that the change of part of the service from covered regulation wagon to street-railway service was unwarranted by the contract. We are unable to give effect to the terms of the contract giving authority to vary the routes, increase or decrease or extend the service thereon, without supporting the change to street-railway service, the only effect of which was to decrease the service undertaken by claimant, and which was clearly authorized by the contracts. The cause or reason why such change or decrease of service might be made was not stated in the contracts, but left to the discretion of the Postmaster-General. * * *
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> After the service had been decreased, as stated, the Postmaster-General submitted to claimant a proposition or suggestion that he voluntarily relinquish part of the contract price

for the continued performance of the services remaining after the change of a part thereof to the street railways, but claimant declined, in which no doubt he was clearly within his rights. In other words, he was under no obligation, under the contracts, to continue at a reduced price. So, therefore, the proposition and its rejection had no effect whatever upon the rights of either party as defined by the contracts, and such were left to be determined by the provisions thereof, according to the terms and stipulations contained therein. The contracts gave the Postmaster-General authority to discontinue the entire service whenever the public interest, in his judgment, should require such discontinuance, the claimant in such case to be allowed one month's extra pay as full indemnity, and this he did in the Boston and Brooklyn contracts.

Against this action of that officer it is argued that he discontinued the service because claimant declined to continue at a reduced rate, but we have not found the action of the officer was so influenced. We must presume, nothing appearing to the contrary —and it does not— such action was influenced solely because, in his judgment, the public interest required the discontinuance of claimant's services under the contracts in question. We can see, also, there was good reason for such conclusion. The service had been rightfully decreased, under the stipulations of the contracts, until the services remaining to be performed were not reasonably worth the original contract rate, and to have continued its payment would have been

contrary to public interests; and while claimant was under no obligation to continue in the service at a reduced rate, the head of the Department was obligated, as well by the duties of his high office as the provisions of the contract, to subserve the public interests in taking care that no unreasonable compensation was paid for the services actually performed. (Rec., pp. 51, 52.)

The discontinuance.

It is contended by counsel for claimant that the action of the Postmaster-General was a discontinuance of the contract, and not a discontinuance of the service.

The facts are that the order of discontinuance read "Discontinue service," etc. (Rec., p. 8), and all the service under claimant's contract was actually discontinued. It is wholly immaterial whether the Postmaster-General did or did not enter into a subsequent contract with the claimant or someone else to perform the remaining service. The discontinuance of the service of the claimant was a discontinuance of "the entire service" on the route within the meaning of the provision of the contract (Rec., pp. 4, 7), and the discontinuance of the service in whole within the meaning of section 817, *supra*.

A reasonable and not an absurd or impossible construction must be placed upon the provision of the contract. The contract itself provides that the service may be increased or decreased and that the entire service

on the route may be discontinued. It may be asked, therefore, What service may be discontinued under the contract? Evidently the service as originally contracted for or the service as *increased or decreased by subsequent orders*. In this case it was the service as decreased by this change. The remaining service, therefore, within the contemplation of this contract, became the entire service. It was all the service which the contractor was required to perform under his contract. "Entire service" can mean no more than all the service which was or might be required of the contractor, and if he had been relieved of the performance of some part of the service by the substitution of a superior service, then in that event his entire service would only be such part of the original service as remained by him to be performed.

On the opposing theory, what would have been necessary to be done by defendants to comply with the construction placed upon the contract by the claimant? Evidently nothing less than the discontinuance of the service remaining under the contract to be performed and also the superior service which had been substituted for it, and the refusal to provide for any mail service whatever upon the route.

To say that the provision in question meant an actual cessation of all service is to advance a theory which is wholly contrary to all practice in the postal service, and which must contemplate a gradual and certain cessation of mail service rather than its growth and increase. It would have been absurd to discontinue the superior service which had been placed on

the route, the maintenance of which was the only reason for desiring the discontinuance at all. It would have resulted to defeat the purposes of the postal service to have failed to provide for service on the remainder of claimant's route.

It is quite immaterial what phraseology is used, whether it be spoken of as a discontinuance of the service or as a discontinuance of the contract. It is in effect in either case a discontinuance of the *service contemplated by the contract.* In this connection see the opinion of the Attorney-General (19 Op. A. G., supra); also *Chicago and Northwestern Railway Company* v. *The United States* (104 U. S., 684), where this court say the Postmaster-General "would be authorized to discontinue the entire service contemplated by the contract, and the practical effect of that would be to terminate the contract itself."

There can be no merit, therefore, in the contention that the act of the Postmaster-General was not a discontinuance of the entire service as contemplated by the contract.

It seems very clear that the action of the Postmaster-General in discontinuing the service under complainant's contract was in accordance with the provision of the contract itself, and fully warranted, and, therefore, that the judgment of the Court of Claims was fully warranted.

LOUIS A. PRADT,
Assistant Attorney-General.

JOSEPH STEWART.

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No. 84.

Mr. Justice DAY delivered the opinion of the Court.

This case was argued with *Slavens* v. *The United States*, No. 228, just decided. It involves the same question as to the right of the Postmaster General to terminate a mail contract. The Court of Claims dismissed the petition. (38 Ct. of Clms. 590.) For the reasons stated in the opinion in the Slavens case, the judgment of the Court of Claims is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.